

## Race and Erasure

### *The Salience of Race to Latinas/os*

Ian F. Haney López

On September 20, 1951, an all-White grand jury in Jackson County, Texas, indicted twenty-six-year-old Pete Hernández for the murder of another farm worker, Joe Espinosa. Gus García and John Herrera, lawyers with the League of United Latin American Citizens (LULAC), a Mexican-American civil rights organization, took up Hernández's case, hoping to use it to attack the systematic exclusion of Mexican Americans from jury service in Texas.<sup>1</sup> García and Herrera quickly moved to quash Hernández's indictment, arguing that people of Mexican descent were purposefully excluded from the indicting grand jury in violation of the Fourteenth Amendment's guarantee of equal protection of the laws. The lawyers pointed out, and the State of Texas stipulated, that while 15 percent of Jackson County's almost thirteen thousand residents were Mexican Americans, no such person had served on any jury commission, grand jury, or petit jury in Jackson County in the previous quarter century.<sup>2</sup> Despite this stipulation, the trial court denied the motion. After two days of trial and three and a half hours of deliberation, the jury convicted Hernández and sentenced him to life in prison.

On appeal, García and Herrera renewed the Fourteenth Amendment challenge. It again failed. The Texas Court of Criminal Appeals held that "in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class."<sup>3</sup> The Texas court held that the Fourteenth Amendment did not cover Mexican Americans in cases of jury discrimination.

With the assistance of Carlos Cadena, a law professor at St. Mary's University in San Antonio, the LULAC attorneys took the case to the United States Supreme Court. On May 3, 1954, Chief Justice Earl Warren delivered the unanimous opinion of the Court in *Hernandez v. Texas*, extending the aegis of the Fourteenth

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Amendment to Pete Hernández and reversing his conviction. The Court did not do so, however, on the ground that Mexican Americans constitute a protected racial group. Rather, the Court held that Hernández merited Fourteenth Amendment protection because he belonged to a class, distinguishable on some basis other than race or color," that nevertheless suffered discrimination in Jackson County, Texas.<sup>4</sup>

*Hernandez* is a central case—the first Supreme Court case to extend the protections of the Fourteenth Amendment to Latinos/as, it is among the great early triumphs in the Latino/a struggle for civil rights. *Hernandez* attains increased significance, however, because it is also the principal case in which the Supreme Court addresses the racial identity of a Latino/a group, in this instance Mexican Americans. No Supreme Court case has dealt so squarely with this question, before or since. This point is all the more striking, and *Hernandez* all the more exceptional, because at least on the surface the Court refused to consider Mexican Americans a group defined by race or color. If theorists intend, as I believe we should, to use race as a lens and language through which to assess the Latino/a experience in the United States, we must come to terms with the elision of race in *Hernandez*.

### Race and Erasure

In the *United States Reports*, *Hernandez* immediately precedes another leading Fourteenth Amendment case, *Brown v. Board of Education*, having been decided just two weeks before that watershed case. Despite extending the reach of the Fourteenth Amendment by unanimous votes, the two cases differ dramatically. In *Brown*, the Court grappled with the harm done through segregation, but considered the applicability of the Equal Protection Clause to African Americans a foregone conclusion. In *Hernandez*, the reverse was true. The Court took for granted that the Equal Protection Clause would prohibit the state conduct in question, but wrestled with whether the Fourteenth Amendment protected Mexican Americans. Nevertheless, as in *Brown*, stark evidence of racism permeates *Hernandez*.

As catalogued by the Court, the evidence in the case revealed the following: First, residents of Jackson County, Texas, routinely distinguished between "white" and "Mexican" persons. Second, business and community groups largely excluded Mexican Americans from participation. Third, until just a few years earlier, children of Mexican descent were required to attend a segregated school for the first four grades, and most children of Mexican descent left school by the fifth or sixth grade. Fourth, at least one restaurant in the county seat prominently displayed a sign announcing "No Mexicans Served." Fifth, on the Jackson County courthouse grounds at the time of the underlying trial, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"). Finally, with respect to jury selection itself, there was the stipulation that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County," a county 5 percent Mexican American.<sup>5</sup>

In their brief to the Court, Hernández's lawyers placed heavy emphasis on this history of discrimination:

While the Texas court elaborates its "two classes" theory, in Jackson County, and in other areas in Texas, persons of Mexican descent are treated as a third class—a notch above the Negroes, perhaps, but several notches below the rest of the population. They are segregated in schools, they are denied service in public places, they are discouraged from using non-Negro rest rooms. . . . They are told that they are assured of a fair trial at the hands of persons who do not want to go to school with them, who do not want to give them service in public places, who do not want to sit on juries with them, and who would prefer not to share rest room facilities with them, not even at the Jackson County court house.<sup>6</sup>

"The blunt truth," Hernández's lawyers insisted, "is that in Texas, persons of Mexican descent occupy a definite minority status."<sup>7</sup>

### The Paradox of Race

Responding to the Texas court's pronouncement that regarding juries the Fourteenth Amendment contemplated only the White and Black races, the Supreme Court could have ruled that the Fourteenth Amendment protected other races as well. But it did not. Instead, while acknowledging that "[t]hroughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws," the Court went on to say that "from time to time *other differences* from the community norm may define other groups which need the same protection."<sup>8</sup> According to the Court, to prevail on his claim Hernández had to show that he was discriminated against as a member of a group marked by inchoate "other differences." Explaining this requirement, the Court suggested that "[w]hether such a group exists within a community is a question of fact," one that "may be demonstrated by showing the attitude of the community."<sup>9</sup> It is in its effort to assess the community attitudes toward Mexican Americans in Jackson County that the Court recited the litany of racism previously noted. Thus, the Court's finding that Hernández met the other-difference/community-attitude test rested squarely on detailed evidence of what fairly may be characterized as widespread racial discrimination.

In light of the Court's heavy reliance on the overwhelming evidence of racial discrimination presented in the case, the Court's insistence that Mexican Americans do not constitute a race seems surprising. It seems all the more startling when one recalls that at the time the Court decided *Hernández*, national hysteria regarding Mexican immigration was running high, and also in light of evidence of possible racist antipathies toward Mexican Americans on the Supreme Court itself.<sup>10</sup> In part, the Court's reticence to acknowledge the cases may have stemmed from the fact that all parties characterized Mexican Americans as racially White, a consensus to which this essay will return.

In addition, however, the Court's assessment of the evidence in *Hernández* was no doubt informed by the contemporary conception of race as an immutable natural phenomenon and a matter of biology—Black, White, Yellow, or Red, races were con-

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considered natural, physically distinct groupings of persons. Races, the Court no doubt supposed, were stable and objective, their boundaries a matter of physical fact and common knowledge, consistent the world over and across history.

Proceeding from this understanding, the Court could not help but be perplexed by the picture of Mexican-American identity presented in *Hernandez*, an identity that at every turn seemed inconstant and contradictory. Though clearly the object of severe racial prejudice in Texas, all concerned parties agreed Mexican Americans were White; though officially so, the dark skin and features of many Mexican Americans seemingly demonstrated that they were non-White; though apparently non-White, Mexican Americans could not neatly be categorized as Red, Yellow, or Black. A biological view of race positing that each person possesses an obvious, immutable, and exclusive racial identity cannot account for, or accept, these contradictions. Under a biological view of race, the force of these contradictions must on some level have served as evidence that Mexican Americans did not constitute a racial group. Thus, the Court insisted in the face of viscerally moving evidence to the contrary that the exclusion of Mexican Americans from juries in Jackson County, Texas, turned neither on race nor color.

Nevertheless, *Hernandez* is virtually unintelligible except in racial terms—in terms, that is, of racial discrimination, of segregation, of Jim Crow facilities, of social and political prejudice, of exclusion, marginalization, devaluation. The Court's evasion of race notwithstanding, the facts of *Hernandez* insist that when Pete Hernández was indicted for murder in 1951, an inferior racial identity defined Mexican Americans in Texas.

That despised identity developed in Texas over the course of more than a century of Anglo-Mexican conflict. In the early years of the nineteenth century, White settlers from the United States moving westward into what was then Spain, and after 1821, Mexico, clashed with the local people, eventually giving rise to war between Mexico and the United States in 1846. During this period, Whites in Texas and across the nation elaborated a Mexican identity in terms of innate, insuperable racial inferiority. According to historian Reginald Horsman, "By the time of the Mexican War, America had placed the Mexicans firmly within the rapidly emerging hierarchy of superior and inferior races. While the Anglo-Saxons were depicted as the purest of the pure—the finest Caucasians—the Mexicans who stood in the way of southwestern expansion were depicted as a mongrel race, adulterated by extensive intermarriage with an inferior [Native American] race."<sup>12</sup> These views continued, and were institutionalized, over the remainder of the last century and well into this one. According to historian Arnolfo De León "in different parts of [Texas], and deep into the 1900s, Anglos were more or less still parroting the comments of their forbears. . . . They regarded Mexicans as a colored people, discerned the Indian ancestry in them, identified them socially with blacks. In principle and in fact, Mexicans were regarded not as a nationality related to whites, but as a race apart."<sup>13</sup> Texas institutionalized this racial prejudice against persons of Mexican descent in the various ways catalogued by *Hernandez*. It is in the attitudes toward and the treatment of Mexican Americans, rather than in human biology, that one must locate the origins of Mexican-American racial identity.

Races do not reflect natural differentiation. Physical features, skin color, hair texture, and so on do not in and of themselves demarcate racial differences. These aspects of somatic diversity instead reflect only a myriad of subtle variations within the human species. Any biological basis to race has now been soundly repudiated. Instead, races are human inventions in which notions of transcendental, innate similarity and difference are assigned to physical features and ancestry. The assignment of racial boundaries arises in the form of social practices, and so reveals itself to be a highly contingent, historically specific process. In Texas, that process resulted in the racialization of Mexican Americans.

In this sense, ironically, the solution to the racial paradox posed in *Hernandez* lies within the "community attitudes" test advanced by the Court. The Court propounded this test as a measure of whether Mexican Americans exist as a distinct, though non-racial, group. In fact, no more accurate test could be fashioned to establish whether Mexican Americans, or any group, constitute a race. Race is not biological or fixed by nature; it is instead a question of social belief. Thus, albeit unwittingly, the *Hernandez* opinion offered a sophisticated insight into the nature of race: whether a racial group exists is always a local question to be answered in terms of community attitudes. To be sure, race is constructed through the interactions of a range of overlapping discursive communities, from local to national, ensuring that divergent and conflicting conceptions of racial identity exist within and among communities. Nevertheless, understanding race as "a question of community attitude" emphasizes that race is not biological but social. Therein lies the irony of the Court's position: avoiding a racial understanding of *Hernandez* in part due to a biological conception of race, the Court nevertheless correctly understood that the existence of Mexican Americans as a (racial) group in Jackson County turned, as race does, not on biology but on community attitudes.

#### Mexican American Racial Identity: White, Then and There

The biological view of race posits that group differences are deeply embedded in nature and highly determinative of group character; under this approach, racial identity is both fixed and easily known. In contrast, a social conception of race posits a virtually antithetical vision wherein both races and their associated characteristics are the products of social practices. Rather than suggesting, as a biological conception does, that racial identities are relatively homogenous and readily apparent and that race is somehow objective and indifferent to viewpoint, the social understanding of race suggests racial identities are complex creations understood and experienced in vastly dissimilar, competing, irreducibly subjective manners. Racial identity emerges as contested and fluid. The unstable nature of Mexican-American racial identity is evident in the origins of the consensus among the parties to *Hernandez* that Mexican Americans were White. This consensus illustrates the particular dynamics of Mexican-American racialization in Texas at mid-century.

When the Texas Court of Criminal Appeals heard *Hernandez*, it did so on the heels of a long line of decisions affirming the exclusion of Mexican Americans from juries. When LULAC undertook to defend Pete Hernández, it too was operating

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along a specific historical trajectory, participating in a continuing effort to secure Mexican-American civil rights from Texas courts. Remarkably, however, in *Hernández* both the Texas court and the LULAC lawyers insisted that Mexican Americans were White. The court proclaimed that "Mexicans are white people," explaining that "Mexican people are not a separate race but are white people of Spanish descent."<sup>14</sup> The attorneys for Hernández agreed, but protested that "[w]hile legally white . . . frequently the term 'white' excludes the Mexican and is reserved for the rest of the non-Negro population."<sup>15</sup> How is it that the Texas courts and the LULAC lawyers both agreed Mexican Americans were White?

For LULAC, the racial identity of Mexican Americans had long been a troubling question. Founded in 1929 in Texas by members of the small Mexican-American middle class, this organization stressed both cultural pride and assimilation. These twin goals were not without their tensions, however, particularly with respect to the question of racial identity. Emphasizing the former often led LULAC to identify Mexican Americans as a distinct race. For example, LULAC's first code admonished members to "[l]ove the men of your race, take pride in your origins and keep it immaculate; respect your glorious past and help to vindicate your people"; its constitution announced, "[w]e solemnly declare once and for all to maintain a sincere and respectful reverence for our racial origin of which we are proud."<sup>16</sup> On the other hand, focusing on assimilation and the right to be free of widespread discrimination, LULAC often emphasized that Mexican Americans were White. "As descendants of Latins and Spaniards, Lulacers also claimed 'whiteness,'" according to historian Mario García. "Mexican Americans as 'whites' believed no substantive racial factor existed to justify racial discrimination against them."<sup>17</sup> To a certain extent, LULAC resolved the tension between seeking both difference and sameness by pursuing these on distinct planes: difference in terms of culture and heritage, but sameness regarding civil rights and civic participation. However, this resolution could not be maintained neatly using the notion of race as then constituted. Race inseparably conflated biology, culture, heritage, civil rights, and civic participation. In racial terms, to be Mexican and different was irreconcilable with being White and the same.

This tension notwithstanding, the decision to defend Pete Hernández constituted part of LULAC's strategy of fighting discrimination against Mexican Americans through the Texas courts. This strategy dictated as well the decision of the lawyers for Hernández to argue that Mexican Americans were White. As Mario García writes: "In [its] antisegregation efforts, LULAC rejected any attempt to segregate Mexican Americans as a nonwhite population. . . . Lulacers consistently argued that Mexicans were legally recognized members of the white race and that no legal or physical basis existed for legal discrimination."<sup>18</sup> For Hernández's attorneys, the decision to cast Mexican Americans as White was a tactical one, in the sense that it reflected the legal and social terrain on which they sought to gain civil rights for their community. On this terrain, being White was strategically key.

While Hernández's lawyers characterized Mexican Americans as White in order to combat discrimination and promote integration, the Texas court did not share those motives in assigning Mexican Americans the same racial identity. The Texas Court of Criminal Appeals' characterization of Mexican Americans as White in *Her-*



*Hernandez* must be viewed in light of that court's prior decisions addressing discrimination against Mexican Americans in the selection of juries. The criminal court had addressed this question on at least seven previous occasions between 1931 and its decision in *Hernandez* in 1952, consistently ruling against the Mexican-American defendant. The court had not, however, been consistent in its racial characterization of Mexican Americans.

In its initial decisions, and as late as 1948, the court construed Mexican-American challenges to jury exclusion as turning on discrimination against members of the "Mexican race." For example, *Ramírez v. State* concerned, according to the court, a challenge to "unjust discrimination against the Mexican race in Menard county,"<sup>19</sup> while *Carrasco v. State* raised a question of "alleged discrimination against the Mexican race on the part of the jury commission."<sup>20</sup> In each of these initial cases, the court denied that racial discrimination had occurred. Instead, the court concluded that the absence of Mexican Americans on local juries reflected the lack of Mexican Americans qualified under the Texas statute for jury service.

This line of reasoning proved troublesome, however. Often, the evidence adduced by the court to demonstrate the lack of qualified Mexican Americans seemed rather to demonstrate racial prejudice. In *Ramírez*, for example, decided in 1931, the court offered the testimony of several local officials as evidence regarding the lack of qualified Mexican Americans. First, the county attorney:

Joe Flack testified that he had been county attorney for about four years and practicing law in Menard county and had resided there for more than fourteen years; that during his residence there he had not known of a person of the Mexican race . . . having been chosen as a grand juror or as a petit juror; that he knew there had been none since he had been county attorney; [and] that he did not think they were qualified to sit on the jury, as those in the county did not know English well enough and were otherwise ignorant.<sup>21</sup>

Next, the sheriff:

The sheriff and tax collector of Menard county testified that . . . he did not remember that any Mexicans had ever been chosen on the grand jury list or the petit jury list since he had resided in the county; that he had never summoned a Mexican on the jury when it became his duty upon direction of the court to go out and summon jurors, and that he did not think the Mexicans of Menard county were intelligent enough or spoke English well enough or knew enough about the law to make good jurors, besides their customs and ways were different from ours, and for that reason he did not consider them well enough qualified to serve as jurors.<sup>22</sup>

And finally, a jury commissioner:

Albert Nauwald testified that he was in the jury commission appointed by the district court that drew the grand jurors who indicted the appellant; that he would not select a negro to sit on the grand jury or petit jury while acting in the capacity of jury commissioner, even though the negro was as well qualified in every way to serve as a juror as any white man; that he was opposed to Mexicans serving on the jury; that he did not consider any individual Mexican's name in connection with making up the jury list; [and] that he did not consider the Mexicans in Menard county as being intelligent

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On the basis of this evidence, the appellate court concurred in the trial court's conclusion that "[t]he proof did not show that there had been discrimination against the Mexican race . . . there was no evidence that there was any Mexican in the County who possessed the statutory qualifications of a juror."<sup>24</sup>

The court in *Ramirez* distinguished between exclusion on the basis of racial prejudice and non-inclusion because of ignorance, insufficient intelligence, different customs and ways, and poor English. According to the court, the former was prohibited but not found in the record, while the latter was permissible and borne out by the weight of evidence. The United States Supreme Court denied certiorari without comment. Subsequently, the Texas appellate court three times more distinguished between impermissible exclusion and permissible non-inclusion in dismissing Mexican-American challenges to "racial" discrimination in jury selection. In each of these decisions, however, the evidence concerning the lack of qualified Mexican Americans seemed not to establish this lack, but rather to show in stark relief the racial discrimination complained of.

In sharp contrast to these four decisions, one by the appellate court in 1946 and two others handed down in 1951 characterized Mexican Americans as White and construed challenges concerning their exclusion from juries not in terms of race but of nationality. In these decisions, heralding the state court's approach in *Hernandez* in 1952, the court quickly rejected the defendants' claims of discrimination in jury selection on the basis of their supposed membership in the White race. For example, in *Salazar v. State*, decided in 1946, the court wrote:

The complaint is made of discrimination against nationality, not race. The Mexican people are of the same race as the grand jurors. We see no question presented for our discussion under the Fourteenth Amendment to the Constitution of the United States and the decisions relied upon by appellant, dealing with discrimination against race.<sup>25</sup>

Similarly, in *Sanchez v. State*, decided in 1951, the court responded to "an exhaustive brief" on the question of discrimination against "Mexican Americans as a race" in the following terse manner: "They are not a separate race but are white people of Spanish descent, as has often been said by this court. We find no ground for discussing the question further and the complaint raised by this bill will not be sustained."<sup>26</sup> With these comments, the court quickly dismissed the defendants' Fourteenth Amendment challenges, dispensing not only with the question of whether there had been discrimination, but also with its previous reformulation of that same question, whether there were qualified Mexican Americans. These were questions the Texas court no longer felt compelled to answer. Instead, it relied solely on the assertion that Mexican Americans were White in order to reject contentions of impermissible discrimination in jury selection. This is the approach the court again took in *Hernandez*.

One cannot know the exact motivations behind the Texas appellate court's decision in *Hernandez* or the preceding cases to categorize Mexican Americans as White. Certainly, precedent existed for such a racial determination. For example, as early as



1897, a federal district court in Texas recognized persons of Mexican descent as "white persons" in the context of federal naturalization law, under which being White was a prerequisite for citizenship. Moreover, during the period when *Hernandez* was decided both the national government and the government of Texas moved officially to qualify Mexican Americans as White. Thus, in contrast to the 1930 census, which catalogued "Mexicans" as a distinct race, the 1940 census classified "[p]ersons of Mexican birth or ancestry who were not definitely Indian or of some other nonwhite race . . . as white."<sup>27</sup> Contemporaneously, Governor Stevenson of Texas reacted to a decision by the Mexican Ministry of Labor to restrict the migration of *bracero* workers to Texas "because of the number of cases of extreme, intolerable racial discrimination" by initiating a state "Good Neighbor Policy."<sup>28</sup> This policy formally proclaimed Mexican Americans valued state citizens and, more importantly, "members of the Caucasian race" against whom no discrimination was warranted.<sup>29</sup> The Texas Court of Criminal Appeals did not specifically cite these factors in its decisions characterizing Mexican Americans as White. Nevertheless, this larger trend toward according Mexican Americans White status, of which the LULAC campaign was a contributing part, may well have added to the court's growing sense between 1946 and 1952 that Mexican Americans were White persons.

It seems quite likely, however, that in addition, the desire of the court to find some basis for neatly disposing of Mexican-American claims of jury discrimination motivated it to construct Mexican Americans as White. Irrespective of the other factors that may have weighed on the court's mind, this one seems probable, especially in light of the progression of these cases. At the time the appellate court in *Hernandez* adopted a White conceptualization of Mexican Americans, the judicial rationale for rejecting claims of racial discrimination against members of that community was fast wearing thin. By 1952, persons challenging the exclusion of Mexican Americans from juries could point, as Hernández's lawyers did, to research indicating that in at least fifty Texas counties with large Mexican-American populations, no Mexican American had ever been called for jury service. They could also demonstrate convincingly that many Mexican Americans qualified for jury service, a point the state stipulated to in *Hernandez*. Finally, a full panoply of Supreme Court cases held that the Fourteenth Amendment prohibited jury discrimination of the sort apparently practiced against Mexican Americans—a roll call of cases on which, as the LULAC lawyers noted in their brief to the Court, "the State of Texas is more than proportionately represented."<sup>30</sup>

Against this backdrop of massive discrimination, purposeful and directed litigation, fast accumulating evidence, and clear constitutional law, the local practices of jury exclusion in Texas counties were increasingly difficult to uphold. Declaring that the Fourteenth Amendment did not protect Mexican Americans in the context of jury selection may have been the most expeditious manner by which the appellate court could immunize such local discriminatory practices. Proclaiming that Mexican Americans were White, and hence, incapable of being the victims of racial discrimination, may have been simply the means to that end. This may not have been the court's sole motivation, but it was likely the principal one.

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### The Salience of Race

The Supreme Court in *Hernandez* rejected a racial understanding of Mexican Americans in part because it subscribed to a conception of race as something natural and therefore stable, fixed, and immutable. Today we know race is none of these. Instead, race is always contingent on the time, place, and people involved. Racial identity turns not simply or even primarily on genetics or skin color but on the competing social meanings ascribed to ancestry and integument, and assigned as well to other aspects of identity, such as language, dress, religion, and so on. Certainly, all of these different factors contributed to the racialization of Mexican Americans in Texas in the sense of both fueling the belief in Mexican-American difference and in serving as confirmation and signifiers of that difference.

It may seem, however, that given the contingencies of race, the Court nevertheless was ultimately correct in deciding *Hernandez* on a non-racial basis. Even had the Court understood race as a social construction, one might argue, it may still have been the wiser course to decide *Hernandez* without reference to race. After all, the Court struck down the challenged discriminatory practices as it would have under a racial approach, but it managed to do so without inscribing the myth that races are real. Under this reading of the case, *Hernandez* would stand not only for the proposition that race is a social construction, but also for the proposal that, having recognized this, we dispense with the concept of race altogether.

Such a reading of *Hernandez* would not be without proponents. More than simply repudiating biological notions of race, prominent scholars such as Anthony Appiah have argued that we should abandon the idea of race itself. "The truth is that there are no races," Appiah writes, and "there is nothing in the world that can do all we ask race to do for us."<sup>31</sup> Good reasons argue for the call to discard all notions of race. Race comes to us out of some of the most terrible shadows of our past, only to find us in a present where race continues to justify the centering of some as privileged and empowered, and the expulsion of others as beyond the boundaries of society's care. Retaining race makes the work of racists easier, while it potentially traps anti-racists in injurious myths of difference. Concluding that race is a social construction, it might make sense simply to jettison the entire scheme.

In the legal context, this is, implicitly, the drift of Christopher Ford's recent articles on efforts at racial categorization. In an article published in 1994 concerning legally recognized racial classifications, Ford warns "that there is something profoundly wrong with an 'anti-discrimination' ethic which calls forth such jurisprudential segregation and brands badges of racial identity onto the face of public life."<sup>32</sup> Although in that piece Ford stops short of explicitly endorsing the abandonment of legally mediated racial taxonomies, he moves closer to that position in a more recent article, where he warns that "[w]ithout at least some adjustment of principle and priority in the way we administer identity in contemporary America, we may face an increasingly bitter spiral of competitive Balkanization, the results of which are by no means likely to favor the minority groups in whose name it will all have been undertaken."<sup>33</sup>

If good reasons argue for repudiating all notions of race, even better ones do so with respect to Latinos/as. Latinos/as historically have not been as consistently racialized as other groups, such as Whites and African Americans. This is especially so regarding Latinos/as or Hispanics as a whole, since these categories are of recent vintage, though it is also true regarding constituent groups such as Mexican Americans or Puerto Ricans. Perhaps the arguments against thinking about groups in racial terms—that it reinforces racism, encourages subscription to false racial essences, and foments balkanization—apply with greater force to a group or groups not already primarily constructed in racial terms. Put differently, if it is true that race can be transcended most easily in the case of a heterogeneous population such as Latinos/as, the arguments for leaving race behind may be all the more difficult to reject with respect to this group. In this way, a praxis of deracination animated by a constructionist understanding of race dovetails with general calls for a non-racial conception of Latinos/as. Should we heed those calls, and eschew race? For a range of reasons, I do not believe so.

### The Experience of Race

To begin with, rejecting race as a basis for conceptualizing Latino/a lives risks obscuring central facets of our experiences. Reconsider the evidence of discriminatory treatment at the root of *Hernandez*. In Jackson County, Mexican Americans were barred from local restaurants, excluded from social and business circles, relegated to inferior and segregated schooling, and subjected to the humiliation of Jim Crow facilities, including separate bathrooms in the halls of justice. Each of these aspects of social oppression substantially affected, although of course even in their totality they did not completely define, the experience of being Mexican American in Jackson County at mid-century.

To attempt to fathom the significance of such experiences, imagine being present at the moment that García called his co-counsel at trial, John Herrera, to testify about the segregated courthouse bathrooms. In picturing this episode, keep in mind that Herrera's ties to Texas stretched back at least to the original 1836 Texas Declaration of Independence, which was signed by his great, great-grandfather, Col. Francisco Ruiz, one of two Mexicans to sign that document. As excerpted from the trial court transcript, Herrera's testimony progressed like this:

Q: During the noon recess I will ask you if you had occasion to go back there to a public privy, right in back of the courthouse square?

A: Yes, sir.

Q: The one designated for men?

A: Yes, sir.

Q: Now did you find one toilet there or more?

A: I found two.

Q: Did the one on the right have any lettering on it?

A: No, sir.

Q: Did the one on the left have any lettering on it?

A: Yes, it did.

Q: What did it

A: It had the letterish words.

Q: What were t

A: The first wor

Q: What does t

A: That means

Q: And the seco

A: "Aqui," mea

Q: Right under

means "Men

A: Yes, sir.<sup>34</sup>

Under cross-exam

Q: There was n

A: No, sir.

Q: It was open t

A: They were be

Q: And didn't h

Only?"

A: No, sir.

Q: Did you und

A: I did feel like

Q: So you did n

A: No, sir, I did

By themselves, to envision the Ja cannot hear García trayed in Herrera the courtroom wa perhaps we can i would fill our gu accusatory bathro our supposed infe prove we exist.

Imagining such worst damage done everyone constructed it the same in non-racial terms in the moment the full dynamics of compare other forms of

What it does af in the United States *Hernandez*, the sort m

Q: What did it have?

A: It had the lettering "Colored Men" and right under "Colored Men" it had two Spanish words.

Q: What were those words?

A: The first word was "Hombres."

Q: What does that mean?

A: That means "Men."

Q: And the second one?

A: "Aqui," meaning "Here."

Q: Right under the words "Colored Men" was "Hombres Aqui," in Spanish, which means "Men Here"?

A: Yes, sir.<sup>34</sup>

Under cross-examination by the district attorney, Herrera continued:

Q: There was not a lock on this unmarked door to the privy?

A: No, sir.

Q: It was open to the public?

A: They were both open to the public, yes, sir.

Q: And didn't have on it "For Americans Only," or "For English Only," or "For Whites Only"?

A: No, sir.

Q: Did you undertake to use either one of these toilets while you were down here?

A: I did feel like it, but the feeling went away when I saw the sign.

Q: So you did not?

A: No, sir, I did not.<sup>35</sup>

By themselves, on paper, the words are dry, disembodied, untethered. It is hard to envision the Jackson County courtroom, difficult to sense its feel and smell; we cannot hear García pose his questions; we do not register the emotion perhaps betrayed in Herrera's voice as he testified to his own exclusion; we cannot know if the courtroom was silent, solemn and attentive, or murmurous and indifferent. But perhaps we can imagine the deep mixture of anger, frustration, and sorrow that would fill our guts and our hearts if it were we—if it were we confronted by that accusatory bathroom lettering, we called to the stand to testify about the signs of our supposed inferiority, we serving as witnesses to our undesirability in order to prove we exist.

Imagining such a moment should not be understood as giving insight into the very worst damage done by racism in this country. Nor should it be taken to suggest that everyone constructed as non-White has come up against such abuse, or has experienced it the same way. Finally, it should not be taken to imply that those denigrated in non-racial terms do not also suffer significant, sometimes far greater harms. Imagining the moment described above cannot and does not pretend to afford insight into the full dynamics of racial oppression, or to provide a solid base from which to compare other forms of disadvantage.

What it does afford, however, is a sense of the experience of racial discrimination in the United States. In this country, the sort of group oppression documented in *Hernandez*, the sort manifest on the bathroom doors of the Jackson County courthouse,

has traditionally been mered out to those characterized as racially different, not to those simply different in ethnic terms. It is on the basis of race—on the basis, that is, of presumably immutable difference, rather than because of ethnicity or culture—that groups in the United States have been subject to the deepest prejudices, to exclusion and denigration across the range of social interactions, to state-sanctioned segregation and humiliation. In comparison to ethnic antagonisms, the flames of racial hatred in the United States have been stoked higher and have seared deeper. They have been fueled to such levels by beliefs stressing the innateness, not simply the cultural significance, of superior and inferior identities. To eschew the language of race is to risk losing sight of these central racial experiences.

### Racial Conditions

Race should be used as a lens through which to view Latinos/as in order to focus attention on the experiences of racial oppression. However, it should also direct our attention to racial oppression's long-term effects on the day-to-day conditions encountered and endured by Latino/a communities. Consider in this vein the segregated school system noted in *Hernandez*. Jackson County's scholastic segregation of Whites and Mexican Americans typified the practices of Texas school boards: although not mandated by state law, from the turn of the century, school boards in Texas customarily separated Mexican-American and White students. In his study of the Mexican-American struggle for educational equality in Texas, Guadalupe San Miguel writes:

School officials and board members, reflecting the specific desires of the general population, did not want Mexican students to attend school with Anglo children regardless of their social standing, economic status, language capabilities, or place of residence. . . . Wherever there were significant numbers of Mexican children in school, local officials tried to place them in facilities separate from the other white children.<sup>16</sup>

Though it should be obvious, it bears making explicit that racism drove this practice. A school superintendent explained it this way: "Some Mexicans are very bright, but you can't compare their brightest with the average white children. They are an inferior race."<sup>17</sup> According to San Miguel, many Whites "simply felt that public education would not benefit [Mexican Americans] since they were intellectually inferior to Anglos."<sup>18</sup> To be sure, as in Jackson County, school segregation in Texas was most pronounced in the lower grades. However, also as in that county, this fact reflects not a lack of concern with segregation at the higher grades, but rather the practice of forcing Mexican-American children out of the educational system after only a few years of school. The segregated schooling noted in *Hernandez* constitutes but one instance in a rampant practice of educational discrimination against Mexican Americans in Texas and across the southwest.

Using the language of race forces us to look to the pronounced effects on minority communities of long-standing practices of racial discrimination. These effects can be devastating in their physical concreteness, as evidenced by the dilapidated school-

house for the School District American schools repeatedly destroyed facilities, and also be personally permanent. Children subject to a sense of self and minds in ren."<sup>19</sup>

Irrespective of the quality of chances. County Jackson County LULAC attorney in Jackson County cited from that county from 1 to 4 years; 35 years; 60 years; 4 years of his that some Mexican also demonstrates against Mexican American college. Conclude: First, on whatsoever; years." The County was

In Jackson County discrimination. racism on the rant close at of supposed not just through cultural, political widespread lives of those can American ing poverty conditions ci

house for the Mexican-American children in Jackson County's Edna Independent School District. According to the testimony of one frustrated mother, the "Latin American school" consisted of a decaying one-room wooden building that flooded repeatedly during the rains, with only a wood stove for heat and outside bathroom facilities, and with but one teacher for the four grades taught there. Such effects may also be personal and intangible, though not for those reasons any less real, dire, or permanent. In Jackson County, as in the rest of Texas, the Mexican-American children subject to state-sanctioned segregation no doubt suffered grave harm to their sense of self-worth and belonging—feelings of inferiority embossed on their hearts and minds in ways unlikely ever to be undone, in the language of Chief Justice Warren.<sup>39</sup>

Irrespective of their form, the conditions produced by racism profoundly degrade the quality of life of non-White community members while also limiting their life chances. Consider in this regard the net educational impact of school segregation on Jackson County's Mexican-American community. In their brief to the Court, the LULAC attorneys sought to establish that at least some Mexican Americans residing in Jackson County possessed sufficient education to serve as jurors; the evidence they cited from the 1950 census proved this. Of the 645 persons of Spanish surname in that county over the age of 24, the lawyers informed the Court, "245 have completed from 1 to 4 years of elementary schooling; 85 have completed the fifth and sixth years; 35 have completed 7 years of elementary schooling; 15 have completed 8 years; 60 have completed from one to three years of high school; 5 have completed 4 years of high school; and 5 are college graduates."<sup>40</sup> Although these figures prove that some Mexican-Americans were educationally qualified to serve as jurors, they also demonstrate the impact of that county's systematic educational discrimination against Mexican Americans. The figures tell us, for example, that out of the Mexican American adult population of 645 in Jackson County, only five had completed college. Consider also two additional numbers from the census that the lawyers don't cite: First, out of that population of 645, fully 175 had received no formal education whatsoever; second, the median number of school years completed was a dismal 3.2 years.<sup>41</sup> The net educational impact of segregation on Mexican Americans in Jackson County was nothing short of disastrous.

In Jackson County, segregated schools were just one manifestation of racial discrimination. As the evidence from that county demonstrates, the effects of long-term racism on the conditions of minority communities are profound. Those effects warrant close attention if we hope to understand the lives of persons oppressed because of supposed racial differences—people systematically relegated to society's bottom, not just through the operation of individual prejudices but by institutionalized cultural, political, and juridical practices. The impact on community members, such as widespread alienation and low levels of education, largely set the parameters of the lives of those within the community. None but the fewest and most fortunate Mexican Americans raised in the 1950s in Jackson County, Texas, could escape the grinding poverty dictated for them by the racial prejudices of Whites there. Because these conditions circumscribe the lives people can reasonably expect to live in this society,



racial language remains a salient vocabulary for discussing socially constituted communities, never more so than when those communities have been severely subordinated in racial terms.

## NOTES

1. GUSTAVO C. GARCÍA, *An Informal Report to the People*, in *A COTTON PICKER FINDS JUSTICE! THE SAGA OF THE HERNANDEZ CASE* (Ruben Munguia ed., 1954).
2. *Hernandez v. State*, 251 S.W.2d 531, 533 (Tex. Crim. App. 1952).
3. *Id.* at 535.
4. *Hernandez v. Texas*, 347 U.S. 475, 477, 479–480 (1954). The Court suggested, but did not explicitly rule, that this “other basis” corresponded to ancestry or national origin. *Id.* at 479.
5. *Id.* at 481, 480.
6. Brief for Petitioner at 28–29, *Hernandez v. Texas* 347 U.S. 475 (No. 406).
7. *Id.* at 13.
8. *Hernandez*, 347 U.S. at 478 (emphasis added).
9. *Id.*
10. *Id.* at 479.
11. Mark Tushnet brings to light revealing comments regarding Mexican Americans made by Justice Tom Clark during a 1952 conference discussion of the segregation decisions: Clark, in a statement which, apart from its racism, is quite difficult to figure out, said that Texas “also has the Mexican problem” which was “more serious” because the Mexicans were “more retarded,” and mentioned the problem of a “Mexican boy of 15 . . . in a class with a negro girl of 12,” when “some negro girls [would] get in trouble.” Mark V. Tushnet, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 194 (1994). Tushnet adds: “These references capture the personal way the justices understood the problem they were confronting, and the unfocused quality suggests that they were attempting to reconcile themselves to the result they were about to reach.” *Id.* Clark, formerly the Civil District Attorney for Texas and a Truman appointee to the Court in 1949, was replaced on the bench by Thurgood Marshall in 1967. William Lockhart et al., *CONSTITUTIONAL RIGHTS AND LIBERTIES: CASES, COMMENTS, QUESTIONS* 1433–35 (8 ed., 1996).
12. Reginald Horsman, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 210 (1981).
13. Arnolde De León, *THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS 1821–1900*, at 104 (1983).
14. *Hernandez v. State*, 251 S.W.2d 531, 535 (citing *Sanchez v. State*, 243 S.W.2d 700, 701 [Tex. Crim. App. 1951]).
15. Brief for Petitioner at 38, *Hernandez v. Texas*, 347 U.S. 475 (No. 406).
16. Mario T. García, *MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY, AND IDENTITY, 1930–1960*, at 30–31 (1989).
17. *Id.* at 43.
18. *Id.* at 48. The insistence by many in the Mexican-American community that they be considered White was also fueled by prejudice harbored against Blacks.
19. *Ramirez v. State*, 40 S.W.2d at 138, 139 (Tex. Crim. App. 1931).
20. *Carrasco v. State*, 95 S.W.2d at 433, 434 (Tex. Crim. App. 1936).
21. *Ramirez*, 40 S.W.2d at 139.

22. *Id.*
  23. *Id.*
  24. *Id.* at 14
  25. *Salazar v.*
  26. *Aniceto*
  27. UNITED STATES
  28. CAREY M.
  29. *Id.* at 27
  30. Brief for
  31. Kwame
  32. Christop
  33. Christop
  34. Transcrip
  35. *Id.* at 76.
  36. Guadaluj
  37. *Id.* at 32,
  38. *Id.* at 51.
  39. Brown v.
  40. Brief for
  41. U.S. Bure
- PERSONS OF SPANISH

22. *Id.*
23. *Id.*
24. *Id.* at 140.
25. *Salazar v. State*, 193 S.W.2d 211, 212 (Tex. Crim. App. 1946).
26. *Aniceto Sanchez v. State*, 243 S.W.2d at 700, 701 (Tex. Crim. App. 1951).
27. UNITED STATES DEPARTMENT OF COMMERCE, SIXTEENTH CENSUS OF THE UNITED STATES: 1940: CHARACTERISTICS OF THE POPULATION 3 (1943).
28. Carey McWilliams, *NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES* 270 (1949, Greenwood 1972).
29. *Id.* at 270-71
30. Brief for Petitioner at 29, *Hernandez v. Texas*, 347 U.S. 475 (No. 406).
31. Kwame Anthony Appiah, *IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* 45 (1992).
32. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1285 (1994).
33. Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 UCLA L. REV. 1953, 2029 (1996).
34. Transcript of Hearing on Motion to Quash Jury Panel and Motion to Quash the Indictment, *State v. Hernandez* (Dist. Ct. Jackson Co., Oct. 4, 1951) (No. 2091), Record at 74-75.
35. *Id.* at 76.
36. Guadalupe San Miguel, Jr., *LET THEM ALL TAKE HEED: MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981*, at 54-55 (1987).
37. *Id.* at 32, citing Paul S. Taylor, *AN AMERICAN-MEXICAN FRONTIER: NUECES COUNTY, TEXAS* (1934) (specific page attribution not given).
38. *Id.* at 51.
39. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).
40. Brief for Petitioner at 19, *Hernandez v. Texas*, 347 U.S. 475 (No. 406).
41. U.S. Bureau of the Census, *U.S. CENSUS OF POPULATION: 1950. VOLUME IV: SPECIAL REPORTS: PERSONS OF SPANISH SURNAME*, 36-67 (1953).